COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Fitchburg Gas and Electric Light Company) D.T.E. 99-118

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THE ATTORNEY GENERAL'S OPPOSITION TO FITCHBURG GAS AND ELECTRIC LIGHT COMPANY'S MOTION TO DEFINE SCOPE OF THE PROCEEDING AND CROSS MOTION TO COMPEL RESPONSES TO DISCOVERY

Pursuant to G.L. c. 30A, §11, the Attorney General of Massachusetts, Thomas Reilly, opposes the motion to define the scope of the proceeding filed by Fitchburg Gas and Electric Light Company ("Fitchburg" or "Company") and files a cross motion to compel responses to discovery pursuant to 220 C.M.R 1.06(6)(c)(4) and Mass. R. Civ. P. 37. In essence, the Company seeks a *de facto* protective order from discovery duly issued by the Attorney General pursuant to the Hearing Officer's scheduling memorandum. As the Attorney General filed his complaint over one year ago seeking rate relief on behalf of the consumers in the Commonwealth under Mass. Gen. L. Ch. 164, § 93, the discovery now sought should come as no unfair surprise to Fitchburg. The company has had over a year to prepare a defense. In addition, Fitchburg interposed blanket, "boiler plate" objections to discovery requests in instances where certain information requested can reasonably be said to be available for production. Consequently, the Attorney General files a cross motion to compel responses to discovery, and, in the alternative seeks to

exclude from the record any untimely discovery responses pursuant to 220 C.M.R. 1.06(c)(4).

I. INTRODUCTION.

A. Procedural History.

On December 31, 1999, the Attorney General filed a complaint pursuant Mass. Gen. L. Ch. 164, § 93, against Fitchburg seeking to reduce rates for consumers who are electric utility ratepayers of Fitchburg. The complaint sought two forms of relief: 1) that the Department initiate an investigation, under G.L. c. 164, § 93, of the Company's electric distribution rates; and 2) that the Department designate a hearing officer for this investigation and schedule an initial conference with all interested parties as soon as possible. Ten months later, by notice dated November 15, 2000, the Department scheduled a public hearing on the complaint for Thursday, December 14, 2000, in Fitchburg, Massachusetts. A procedural conference was held on December 19, 2000.

On January 5, 2001, the Hearing Officer issued a memorandum setting forth a very aggressive procedural schedule: it required the Company to file an Answer by January 16, 2001, commenced the discovery period, set deadlines for the submission of pre-filed testimony and briefing and scheduled evidentiary hearings for April 2-3, 2001. After having been served with the procedural memorandum after 5:00 pm on January 5, 2001, the Attorney General initiated discovery on January 8, 2001, and issued a second set of information requests on January 10, 2001. On January 17, 2001, the Attorney General received a copy of the Company's motion to "dismiss" accompanied by a proposed answer. On January 18, 2001, the Company served a response to the Attorney General's second set of information requests (attached as exhibit A), and filed a motion to define the scope of the proceedings.

The Attorney General opposed the motion to dismiss on January 22, 2001, and filed a cross motion for leave to amend the complaint. The Attorney General now opposes the

motion to define the scope of the proceedings and files a cross motion to compel discovery responses.

II. ARGUMENT.

A. The Department Has Adequately Defined The Scope Of The Proceedings.

Fitchburg argues that the Department's notice of the hearing was so defective as to raise due process concerns. According to the Administrative Procedures Act, when defining the scope of an adjudicatory hearing the Department is required to give:

(1) Reasonable notice of the hearing shall be accorded all parties and shall include statements of the time and place of the hearing. Parties shall have sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument. If the issues cannot be fully stated in advance of the hearing, they shall be fully stated as soon as practicable. In all cases of delayed statement, or where subsequent amendment of the issues is necessary, sufficient time shall be allowed after full statement or amendment to afford all parties reasonable opportunity to prepare and present evidence and argument respecting the issues.

G.L. c. 30A, § 11(1). The statute requires that the Department provide parties with "sufficient notice of the issues involved to afford them reasonable opportunity to prepare and present evidence and argument." Id.

The Massachusetts Supreme Judicial Court has held that "the department accorded [a party] 'sufficient notice of the issues involved (in the proceeding below) to afford . . . (it) reasonable opportunity to prepare and present evidence and argument,' within the meaning of G.L. c. 30A, s 11(1)" when the Department "served on [that party] a notice of hearing which declared that proceedings would be held to investigate '***the propriety of the rates and charges***' contained in [the company's] proposed tariff." New England Tel. & Tel. Co. v. Department of Public Utilities, 372 Mass. 678, 363 N.E.2d 519 (1977) (emphasis added) "The Department has found that the filing of a general rate case places a company on notice that every element of the rate request is at issue. Bay State Gas

Company, D.P.U. 1535-A at 17 (1983)." Boston Gas Company, D.P.U. 96-50-C (Phase I), p. 46 (1997).

The Department has articulated what constitutes "sufficient notice of the issues" in Bay State Gas Company, D.P.U. 1535-A, p. 17 (1983): a party requesting a general rate increase is on notice that all aspects of its filing are at issue. Additionally, the Department has held that the obligation to provide notice has been fulfilled where the existence of specific topics for inquiry have been noted in a previous Order; where a witness has been questioned on a particular topic; where an information request has been marked as evidence regarding an issue; or where a company has been asked to provide a witness to address a certain topic. New England Telephone and Telegraph Company, D.P.U. 86-33-D, p. 9 (1987).

Bay State Gas Company, D.P.U. 92-111, p. 6 (1992). In the circumstances of this case, the filing of a complaint under § 93 would raise the same issues as those noticed in a regular rate case.

The Massachusetts Supreme Judicial has also discussed the scope of a proceeding that may occur when a complaint is filed under Mass. Gen. L. Ch. 164, § 93:

A procedure existed by which the petitioners could compel official hearing of their grievances. If they believed the fuel adjustment clauses were inherently improvident or were resulting in excessive returns to the companies; if they doubted the propriety of any features of the clauses or thought the calculations under the clauses were erroneous; if they had any relevant objections, they had available to them G.L. c. 164, s 93, as appearing in St.1963, c. 615, s 4. This states broadly that any twenty customers of a company may file written complaint 'either as to the quality or price' of the electricity furnished, whereupon the department is required to give appropriate notice and hold a public hearing and order any suitable change of price or improvement of quality.

Consumers Organization for Fair Energy Equality, Inc. v. Department of Public Utilities, 368 Mass. 599, 335 N.E.2d 341 (1975). According to the courts, it appears clear that once an issue is raised by a § 93 complaint, the Department initiates a proceeding which would enable it to "order ***any*** suitable change of price." Id. (emphasis added). The scope of any proceeding under § 93 is necessarily broad given the numerous issues native to rate determinations.

Regarding its method of determining rates the Department has long applied the so-called historic "test year" cost of service model:

The Department examines a test period usually the most recent twelve-month period for which complete financial information exists on the theory that the revenue, expense, and rate base figures during that period accurately reflect the utility's present financial situation and fairly predict the Company's future performance. [citation omitted]. To the extent that known or anticipated changes in revenues, expenses, or rate base will distort the correlation among these elements, adjustments are made in the test-year data to reflect those changes.

Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 24, 375 N.E. 2d 305 (1978), *cert. denied* 439 U.S. 921 (1978). *See also* Massachusetts Electric Company v. Department of Public Utilities, 383 Mass. 675, 421 N.E. 2d 449 (1981) (rejecting use of a future test year method). In his complaint, the Attorney General referred to the Company's return on equity as a measure of the unreasonableness of the Company's rates. Thus, the complaint, which was referenced in the Department's formal notice of this proceeding, raises the issues of both Fitchburg's costs and revenues. The discovery issued by the Attorney General was designed to obtain specific information regarding Fitchburg's costs and revenue, and consequently falls within the scope of the § 93 proceeding as noticed by the Department.[(1)]

The Attorney General acknowledges that, absent overcharges or fraud, rates are generally prospective in nature, Lowell Gas Co. v. Attorney General, 377 Mass, 37, 44-45, 385 N.E.2d 240 (1979), and that a host of cost and revenue information would be relevant to this proceeding.

B. Fitchburg Has No Adequate Basis For Objecting To The Attorney General's Discovery.

In response to the Attorney General's second set of information request, Fitchburg has asserted a blanket objection and failed to produce any responsive evidence in response to requests AG-2-6 to AG-2-14. See Exhibit A. According to 220 C.M.R. 1.06(6)(c)(2), discovery before the Department is guided by the liberal discovery procedures and policies available to civil litigants under Mass. R. Civ. P. 26 *et seq*. The broad language of the rules provides for the discovery of all information that is relevant or "appears reasonably calculated to lead to the discovery of admissible evidence," so long as the materials sought are not privileged. Mass. R. Civ. P. 26(b)(1); Hull Mun. Lighting Plans v. Massachusetts Mun. Wholesale Elec. Co., 414 Mass. 609, 615, 609 N.E. 2d 460 (1993). Relevancy is also construed broadly, encompassing "any matter that bears on, or

that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Cronin v. Strayer, 392 Mass. 525, 534, 467 N.E.2d 143 (1984), *quoting* Hickman v. Taylor, 329 U.S. 495, 501, 67 S.Ct. 385, 91 L.Ed. 451 (1947). The language of Mass. R. Civ. P. 26(b) allows parties to make searching examinations into matters that may assist them in discovering non-privileged, relevant evidence. "Discovery should ordinarily be allowed under the concept of relevancy unless it is clear that the information sought can have no possible bearing upon the subject matter of the action." Miller v. Doctor's Gen. Hosp., 76 F.R.D. 136, 138 (1977).

Fitchburg's uniform objection reads as follows:

OBJECTION: FG&E objects to the requests as overly broad, burdensome and beyond the reasonable scope of the proceeding as contemplated by the Department's procedural schedule. These requests essentially ask the Company to produce balances, work papers, calculations and all documentation for the components of cost of service studies covering in whole or in part, the years 1998, 1999 and 2000. Production of such information would require a complete cost of service analysis and could not be conducted within the time frame of the Department's procedural schedule.

(Fitchburg's response to Attorney General's second information request, AG-2-6 to AG-2-14).

When the Company has not objected on grounds of privilege or relevancy, but rather on the timing of the requests, it must be emphasized that it received a copy of the Attorney General's complaint over a year before receiving the discovery. Fitchburg can hardly claim a lack of actual notice of the revenue and cost issues. Given the nature of the allegations regarding the unreasonableness of its electric distribution rates, Fitchburg had twelve months to conduct the necessary research and analysis to prepare a defense. If the Company has failed or neglected to take such prudent steps as a way of protracting these proceedings in hopes of extending the period for collecting unreasonable rates, the Department should not allow the Company to use the discovery rules to endorse such gamesmanship.

Furthermore, Fitchburg interposed it's "boilerplate" objection, quoted above, to requests for information that should be readily available. The Company, as of this date, has objected to nine information requests -- the Attorney General's information requests AG-2-6 through AG-2-14.[(2)] Fitchburg is under an obligation to respond with available information. As explained in detail below, responses regarding 1998 and 1999 should be readily at hand, requiring nothing more than: (1) extracting data from the Company's existing financial accounts; (2) performing simple calculations to allocate costs (e.g., property taxes) amongst services; or (3) stating the Company's position on subsidiary facts (e.g., the "representativeness" of costs or revenues):

AG-2-6 For the 1998 and 1999 information items (a) through (i) should be found in the Company's charts of account; item (j) requires a simple calculation; item (k) requires minor analysis for appropriate rate base pro forma adjustments.

AG-2-7 All of the 1998 and 1999 information should be found in the Company's charts of account.

AG-2-8 For 1999 information items (a) should be found in the Company's charts of account; item (b) should be found in the Company's charts of account along with the additional requirement to show the allocators used to determine certain costs; item (c) should be found in the Company's charts of account; item (d) should be found in the Company's charts of account along with the additional requirement to show the allocators used to determine certain costs; item (e) should be found in the Company's charts of account along with the additional requirement to show the allocators used to determine certain costs; item (f) requires minor analysis for appropriate expense pro forma adjustments; item (g) requires minor analysis for appropriate expense pro forma adjustments; item (h) requires minor analysis for appropriate expense pro forma adjustments.

AG-2-9 All of the 1999 information for items (a) - (e) each require minor analysis for appropriate revenue pro forma adjustments.

AG-2-10 All of the 1999 information should be provided. Most of the items should be found in the Company's charts of account, although the answers require a simple calculation to determine the capital cost rates.

AG-2-11 All of the 1999 information should be provided. All of these items may require simple calculations to determine the amounts by rate class.

AG-2-12 All of the 1999 information should be provided. All of these items may require simple calculations to determine the amounts by employee group (e.g., union, management, non-union, non-management).

AG-2-13 The 1999 information should be found in the Company's charts of account.

AG-2-14 All of the 1999 information should be provided. All of these items may require simple calculations to determine the amounts by employee group (e.g., union, management, non-union, non-management).

Under the controlling standards of review, the Attorney General is entitled to responses to the discovery issued. The Company cannot, and must not be permitted, to withhold relevant information from discovery that is particularly within its knowledge.

C. The Attorney General Is Entitled To An Order Compelling Discovery Responses.

When a party fails to respond to discovery, the Department has the authority to compel a response, impose appropriate sanctions under Mass. R. Civ. P. 37 and take other remedial steps. 220 C.M.R. 1.06(6)(c)(4). The Attorney General has served relevant and probative discovery regarding the Company's claimed defenses and should be entitled to timely responses so as not to delay or hinder these proceedings.

III. CONCLUSION.

As explained fully above, the Company's motion should be denied and the cross motion to compel discovery responses should be granted.

Wherefore: The Attorney General requests that Fitchburg's motion to define the scope of the proceedings be denied. The Attorney General also requests an Order that the Company respond fully and completely to all outstanding discovery requests within (5) business days of the Order, and that the deadline for Attorney General's pre-filed testimony be rolled back to account for each day of delay caused by the Company's failure to respond to discovery since January 18, 2001.

In the alternative, the Attorney General requests an evidentiary ruling that the Company shall not enter into the record, or otherwise use for any evidentiary purposes, the information contained in any untimely discovery response.

RESPECTFULLY SUBMITTED,

THOMAS REILLY

ATTORNEY GENERAL

By:

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Date: January 26, 2001

Certificate of Consultation

Pursuant to the ground rules issued in this case, I, George B. Dean, Assistant Attorney General, certify that I have conferred with Scott Mueller, counsel for Fitchburg Gas and Electric Light Company in DTE 99-118 on January 26, 2001 at approximately 3:00 p.m., in a good faith attempt to resolve or narrow the discovery issues which are the subject of the motion to compel.

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George B. Dean, Chief, Regulated Industries Division

1. As to the issue of proceeding with detailed discovery at this juncture rather than filing a motion for summary judgment, the Attorney General notes that the scheduling memorandum issued by the Hearing Officer implicitly denied the Attorney General the procedural benefit of summary judgment since the order provided expressly that discovery, briefing and hearing schedule would continue unabated. See Hearing Officer Memorandum, p. 2 (January 17, 2001). Little or no efficiency would be gained as a result of filing a motion for summary disposition.

2. As to the Attorney General's other information requests, Fitchburg has not served any objections, but instead has represented that it will forward the information when assembled. As of the filing of this motion, however, nearly half of these information requests remain outstanding. Charts listing the outstanding requests and requests with a

partial response are attached as exhibit B. The Attorney General specfically reserves it rights to compell responses to these discovery requests as well.